

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
DOUGLAS WAYNE BAUGHMAN,)	CASE NO. 10-30022 HCD
)	CHAPTER 13
)	
DEBTOR.)	
)	
)	
KATHY L. LYNCH,)	
)	
PLAINTIFF)	
vs.)	PROC. NO. 10-3040
)	
DOUGLAS WAYNE BAUGHMAN,)	
)	
DEFENDANT.)	

Appearances:

Catherine Molnar-Boncela, Esq., counsel for plaintiff, Gordon E. Gouveia & Associates, 433 West 84th Drive, Merrillville, Indiana 46410; and

Thomas E. Panowicz, Esq., counsel for defendant, Voltz-Miller & Panowicz, P.C., 1951 East Fox Street, South Bend, Indiana 46613.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 15, 2011.

Before the court is the Motion to Dismiss (“Motion”) filed by the defendant Douglas Wayne Baughman, chapter 13 debtor. It seeks to dismiss the Amended Complaint to Determine Dischargeability (“Complaint”) filed by the plaintiff Kathy L. Lynch, creditor of the debtor.¹ The plaintiff did not respond to the Motion. For the reasons that follow, the court grants the Motion to Dismiss.²

¹ The court granted the plaintiff leave to amend her Complaint. *See* R. 10.

² The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

The defendant asks the court to dismiss the plaintiffs' Complaint pursuant to Rule 7012(b) of the Federal Rules of Bankruptcy Procedure and Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.³ To state a claim for relief, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."⁴ Fed. R. Civ. P. 8(a)(2). However, the Supreme Court no longer reviews the sufficiency of a complaint by asking whether "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," the test established more than half a century ago in *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957). After the Court recently criticized *Conley's* "no set of facts" language in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007), in *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 167 L.Ed.2d 1081 (2007), and in *Ashcroft v. Iqbal*, _U.S._, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009), courts of appeals wrestled with what "higher bar" the Supreme Court had set in its place. The Seventh Circuit succinctly stated the new test:

The Supreme Court has described the bar that a complaint must clear for purposes of Rule 12(b)(6) as follows: "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" [*Iqbal*, 129 S. Ct. at 1949.] A "formulaic recitation of the elements of a cause of action will not do." *Id.* Nonetheless, a plaintiff must provide "only 'enough detail to give the defendant fair notice of what the claim is and the grounds upon which it rests, and, through his allegations, show that it is plausible, rather than merely speculative, that he is entitled to relief.'" *Tamayo [v. Blagojevich]*, 526 F.3d 1074, 1083 [7th Cir. 2008)]. Furthermore, plaintiffs must plead their accusations of fraud with particularity. Fed. R. Civ. P. 9(b); *Arazie v. Mullane*, 2 F.3d 1456, 1465 (7th Cir. 1993) (stating that particularity requires the party to specify the "who, what, when, where and how" of the alleged fraudulent act).

³ Federal Rule of Bankruptcy Procedure 7012(b) states that Rule 12 (b)-(h) of the Federal Rules of Civil Procedure are applicable in adversary proceedings. Rule 12(b)(6) is the affirmative defense that the complaint must be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

⁴ Federal Rule of Bankruptcy Procedure 7008 states that Rule 8 of the Federal Rules of Civil Procedure applies in adversary proceedings. Rule 8(a) states that a pleading "shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . , (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks." Fed. R. Civ. P. 8(a).

Reger Development, LLC v. National City Bank, 592 F.3d 759, 763-64 (7th Cir.), *cert. denied*, 130 S. Ct. 3507 (2010); *see also Swanson v. Citibank, N.A.*, 614 F.3d 400, 403-04 (7th Cir. 2010) (“[T]he plaintiff must give enough details about the subject matter of the case to present a story that holds together. In other words, the court will ask itself *could* these things have happened, not *did* they happen.”); *Atkins v. City of Chicago*, 631 F.3d 823, 832 (7th Cir. 2011) (stating that, after *Twombly* and *Iqbal*, a complaint must have “enough substance to warrant putting the defendant to the expense of discovery”). With these guidelines, the court turns to the defendant’s Motion to Dismiss.

The defendant asserted that the allegations of the Complaint were insufficient to support a claim of nondischargeability and that the allegations based upon fraud did not state with particularity the circumstances constituting fraud. In addition, he pointed out, the plaintiff filed no response to the defendant’s Motion; she amended the Complaint, but did not address the defendant’s reasons for dismissing the Complaint. The court could grant the Motion simply on the ground that the plaintiff failed to respond to the defendant’s Motion. But it instead will examine the plaintiff’s Amended Complaint to determine whether the amendments provided any meaningful response to the defendant’s reasons for dismissal and whether it can survive the defendant’s dismissal motion under the standards set by *Twombly*, *Pardus*, and *Iqbal*.

The three-count Complaint alleged that the defendant’s debt to the plaintiff was excepted from discharge under three subsections of 11 U.S.C. § 523. Count I was brought pursuant to § 523(a)(2)(A).⁵ To prevail on a § 523(a)(2)(A) claim, a creditor must establish that: “(1) the debtor made a false representation or omission, (2) that the debtor (a) knew was false or made with reckless disregard for the truth and (b) ... made with the intent to deceive, [and] (3) upon which the creditor justifiably relied.” *Ojeda v. Goldberg*, 599 F.3d 712, 717 (7th Cir. 2010) (citing cases); *see Field v. Mans*, 516 U.S. 59, 74-75, 116 S. Ct. 437, 133

⁵ Section 523(a)(2)(A) provides that an individual debtor is not discharged from any debt “for money, property, [or] services” to the extent obtained by “false pretenses, a false representation, or actual fraud.” 11 U.S.C. § 523(a)(2)(A).

L. Ed. 2d 351 (1995) (holding that a creditor’s reliance need only be justifiable, not reasonable). In addition, “actual fraud” has been interpreted broadly in this circuit; it may encompass “any deceit, artifice, trick or design involving direct and active operation of the mind, used to circumvent and cheat another.” *McClellan v. Cantrell*, 217 F.3d 890, 893 (7th Cir. 2000). The creditor must prove every one of the elements to support a finding of nondischargeability under § 523(a)(2)(A). See *Rae v. Scarpello (In re Scarpello)*, 272 B.R. 691, 700 (Bankr. N.D. Ill. 2002) (citing *Bletnitsky v. Jairath (In re Jairath)*, 259 B.R. 308, 314 (Bankr. N.D. Ill. 2001)). In this case, the plaintiff’s Count I referred to “fraudulent activities of the Debtor,” but nowhere in the Complaint did the plaintiff establish the elements of § 523(a)(2)(A) or allege fraud with any specificity. See *In re Young*, 428 B.R. 804, 819 (Bankr. N.D. Ind. 2010).

Likewise, Count II’s allegations pursuant to § 523(a)(4) failed to allege fraud in any detail.⁶ The count referred only to “fraudulent activities of the Debtor as an officer of Baughman Construction”; it left to the reader’s imagination what those activities were and what fiduciary relationship existed between the debtor and plaintiff. See *In re Berman*, 629 F.3d 761, 767-68 (7th Cir. 2011). It also failed to specify whether it claimed that the debtor’s conduct constituted fraud, defalcation or embezzlement. Embezzlement, for example, is defined as the “fraudulent appropriation of property by a person to whom such property was entrusted or into whose hands it has lawfully come.” *In re Weber*, 892 F.2d 534, 538 (7th Cir. 1989) (quoting *Moore v. United States*, 160 U.S. 268, 269, 16 S. Ct. 294, 295, 40 L.Ed. 422 (1895)). Count II does not allege misappropriation of property; although the “Description of Transactions” states that the debtor did not pay the subcontractors and instead converted the funds to his personal use, there is no allegation of intent to defraud. “To prove embezzlement, the creditor must show . . . that (1) the debtor appropriated funds for his or her own benefit; and (2) the debtor did so with fraudulent intent or deceit.” *In re Weber*, 892 F.2d at 538 (citing cases); see also *Pierce v. Pyritz*, 200 B.R. 203, 205 (N.D. Ill. 1996). The court finds that the

⁶ Section 523(a)(4) excepts from a debtor’s discharge any debt “for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.” 11 U.S.C. § 523(a)(4).

allegations in this Complaint are simply too sketchy to fulfill the requirements of Rule 9(b) for specificity of fraudulent conduct or of Rule 8 for notice of the actual claims against the defendant.

In Count III, the plaintiff contended that the debt incurred by the defendant was excepted from discharge under § 523(a)(6).⁷ She alleged “debts resulting from the activities of the Debtor and the resulting injury caused by the Debtor’s willful and malicious actions toward the Plaintiff that resulted in the significant dissipation of the marital estate at the time of and prior to the divorce.” R. 9, ¶ 28. This allegation provides more detail than was found in earlier paragraphs of the Complaint, but it fails to state a claim under § 523(a)(6). To show that the defendant’s debt to the plaintiff was nondischargeable under § 523(a)(6), the plaintiff must prove that the debtor willfully (*i.e.*, deliberately or intentionally) and maliciously (*i.e.*, without just cause or excuse, in conscious disregard of one’s duties) injured the plaintiff or her property. To be successful, she must demonstrate that the debtor intended the injury, not merely the act that caused the injury. *See Garoutte v. Damax, Inc.*, 400 B.R. 208, 212-13 (S.D. Ind. 2009). The Supreme Court required a plaintiff to show that the defendant intended to cause harm or that there was a substantial certainty that harm would occur. *See Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S. Ct. 974, 977, 140 L.Ed.2d 90 (1998) (holding that a nondischargeable action under § 523(a)(6) “takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury”). In this case, the plaintiff alleged willful and malicious actions that resulted in an injury; she did not allege an intentional injury. In addition, the factual allegations do not present facts suggesting that the debtor intended an injury to the plaintiff or her property. The court finds that the conclusory statement in Count III did not suffice to state a claim under § 523(a)(6).

Accordingly, the court determines that the Complaint failed to allege sufficient facts to state a claim under § 523(a)(2)(A), (a)(4), or (a)(6) that is plausible on its face. Counts I and II of the Complaint also failed to allege sufficiently particular fraudulent conduct to satisfy Rule 9(b).

⁷ Section 523(a)(6) renders nondischargeable any debt “for willful and malicious injury by the debtor to another entity or to the property of another entity.” 11 U.S.C. § 523(a)(6).

CONCLUSION

For the reasons presented in the Memorandum of Decision, the court grants the defendant's Motion to Dismiss the plaintiff's Amended Complaint.

SO ORDERED.

/s/ HARRY C. DEES, JR.
HARRY C. DEES, JR., JUDGE
UNITED STATES BANKRUPTCY COURT